1975

Union Ski Company v. Union Plastics Corporation : Brief of Appellant

Utah Supreme Court

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IN THE SUPREME COURT OF THE STATE OF UTAH

UNION SKI COMPANY
Plaintiff and Appellant,

vs.

Case No. 14065

UNION PLASTICS CORPORATION
Respondent & Defendant

[redacted] BRIEF OF APPELLANT

Appeal from Judgment
of the Fourth District Court
for Utah County
Honorable Allen B. Sorensen Judge

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UNION SKI COMPANY
Plaintiff and Appellant,

vs.

UNION PLASTICS CORPORATION
Respondent & Defendant

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[redacted] BRIEF OF APPELLANT

STATEMENT OF THE KIND OF CASE

This is an action for a breach of contract which existed between the parties for the production and marketing of a plastic ski boot. The defendant failed to manufacture the boots as agreed. Plaintiff seeks a return of payments made to Defendant and other damages resulting from defendant's breach. The plaintiff, Union Ski Company, a Utah corporation, caused a summons to be served upon the defendant, Union Plastics Corporation. To enhance the chances of settlement the plaintiff and the defendant entered into a stipulation that allowed the plaintiff to file a simple, one-page statement of the cause of

action with the right to amend the same at a later date, and which allowed the defendant to withhold its answer to the complaint until an answer was demanded in writing from the plaintiff. When settlement negotiations broke down, the plaintiff demanded that the defendant answer the complaint, and the defendant moved the court to quash service of process and to dismiss the complaint for lack of jurisdiction over the defendant corporation.

DISPOSITION IN LOWER COURT

After the submission of briefs and affidavits of the parties, the district court denied defendant's motion to quash sercice of process and granted defendant's motion to dismiss for lack of jurisdiction. The court made no finds and no basis of the decision was stated.

RELIEF SOUGHT ON APPEAL

The plaintiff seeks this court's reversal of that ruling dismissing the cause of action for lack of jurisdiction and remand the matter to the district court for trial.

STATEMENT OF FACTS

The plaintiff, Union Ski Company, is a Utah corporation with its sole place of business located at Provo, Utah. The corporation was organized by limited stock offering to the residents of the state of Utah. The plaintiff was organized for the purpose of marketing internationally a plastic ski boot which was designed by the defendant and which was to be manufactured by the defendant. (Tarran Affidavit R106 Line 11) Since the ski boot which was to be manufactured by the defendant was plaintiff's sole product, and none were ever manufactured, the plaintiff has closed its offices, discharged its personnel, and has otherwise ceased all operations as a business. (Jolly Affidavit R51)

The defendant, Union Plastics Corporation, is a corporation organized under the laws of the State of California, with its principal place of business at North Hollywood, California. The said defendant is a wholly-owned subsidiary and division of the Union Corporation, Verona, Pennnsylvania. The defendant is in the business of manufacturing plastic products.

The plaintiff's position is that the courts of Utah have jurisdiction over the defendant upon

several grounds: FIRST, the defendant's negotiations in the state of Utah with the plaintiff (and its predecessor in interest, Sports Industries, Inc.,) in December of 1973 and January resulting in a contract constitute a transaction of business in the state of Utah within the meaning of Utah's "long-arm" statute, section 78-27-24(1) (supp. 1969); SECOND, the defendant contracted to supply goods to and through the Plaintiff to residents of the state of Utah within the meaning of Utah's "long-arm" statute, section 78-27-24(2) (supp. 1969); THIRD, that the defendant's substantial business contacts with the state of Utah warrent the assertion of jurisdiction under common law standards; FOURTH, the defendant, by and through its attorney, by stipulation, agreed that an amended complaint could be filed in this action, and that service of process by registered mail to defendant's attorney was sufficient and good service of the defendant.

The defendant contends that it was not transacting business in this state, either within the meaning of the "long-arm" statute or under common law jurisdictional standards, and further contends that it did not have sufficient minimum contacts with the state of Utah to permit a constitutional assertion of jurisdiction by Utah courts, and that

several grounds: FIRST, the defendant's negotiations in the state of Utah with the plaintiff (and its predecessor in interest, Sports Industries, Inc.,) in December of 1973 and January resulting in a contract constitute a transaction of business in the state of Utah within the meaning of Utah's "long-arm" statute, section 78-27-24(1) (supp. 1969); SECOND, the defendant contracted to supply goods to and through the Plaintiff to residents of the state of Utah within the meaning of Utah's "long-arm" statute, section 78-27-24(2) (supp. 1969); THIRD, that the defendant's substantial business contacts with the state of Utah warrent the assertion of jurisdiction under common law standards; FOURTH, the defendant, by and through its attorney, by stipulation, agreed that an amended complaint could be filed in this action, and that service of process by registered mail to defendant's attorney was sufficient and good service of the defendant.

The defendant contends that it was not transacting business in this state, either within the meaning of the "long-arm" statute or under common law jurisdictional standards, and further contends that it did not have sufficient minimum contacts with the state of Utah to permit a constitutional assertion of jurisdiction by Utah courts, and that

the service of summons was not sufficient.

The defendant's positions, however, are untenable for numerous reasons. There are numerous undisputed facts which clearly show that the defendant was transacting business within the meaning of the U.C.A. 78-24-24(1). Arthur Eizenberg, the general manager of the defendant corporation, admits he made four business trips to Utah to transact business related to plaintiff's cause of action. Mr. Eizenberg's affidavit says that during the trip of December 28, 1973, he held discussions with Brent Hall concerning the finalization of the agreement which is the subject of this lawsuit. (Eizenberg Aff. R23, Line 4) The agreement was not finalized as a result of that trip and Mr. Eizenberg again returned to Utah on January 4, 1974, to conduct further negotiations. On January 5, 1974, plaintiff's predecessor in interest, Sports Industries, Inc., and the defendant had reached an agreement, and reduced the agreement of the parties to writing. (Hall Aff. R66; Wood Aff. R98; Jolley Aff. R101; Tarran Aff. R107)

The agreement reached by the parties was based principally upon a proposed contract which had been prepared by the lawyers of the Defendant's parent corporation, Union Corporation of Verona, Pennsylvania.

The agreement briefly summarized provided, among other things, that the defendant would design and manufacture a plastic ski boot to be marketed by Sports Industries, Inc.; the defendant specifically warrented that as of July 1, 1974, they could produce sufficient quantitites to meet the required sales volumes indicated in the contract; that Sports Industries was to make advance payments to Union Plastics for the boots that it was to produce; that Sports Industries was to be the exclusive distributors of the boot to be manufactured by the defendant; if plaintiff's sales of the ski boot would "yield to Union . . . minimum revenues" of $600,000.00 for the year 1974, and increasing thereafter to a "minimum annual gross to Union of $2,000,000.00 by 1978."

Pursuant to the agreement, plaintiff (Sports Industries, Inc.,) by a check dated January 5, 1974, paid defendant $25,000.00. (Jolley Aff. R100 9T 13) The defendant shortly thereafter negotiated the said instrument. (copy of check R99)

The defendant contends that the contract was never executed in Utah, but does, as noted above, admit that it was partially negotiated in Utah. (Eizenberg Aff. R23 Line 4) All future amendments to the contract continued to show January 5, 1974,

as the effective date of the contract. In February of 1974, Sports Industries principals formed the plaintiff corporation and assigned the contract to it. The defendant has never denied the existance of the contract; their only denial has been that the contract was not signed on January 5, 1974. It is clear that the parties considered January 5 as the effective date of the contract since both parties commenced performance immediately. As a result of the distributorship contract, plaintiff held a "kick-off" sales meeting on January 11, 1974, at Provo, Utah. In furtherance of the January 5th agreement, defendant's general manager, Arthur Eizenberg, attended that sales meeting and was the featured speaker. (Eizenberg Aff. R23, Aff. R100; Scmidt Aff. R21, Hall Aff. R114; Tarran Aff. R107; Jensen Aff. R103) The sales efforts of the plaintiff were very successful, and by April 30, 1974, the general manager of the defendant was able to report in writing to the parent company the following:

> To date we have orders (from the plaintiff) for approximately 10,000 pair, or approximately $218,000.00 These orders represent trial quantities only, and in many cases are dependent upon the customer's approval of the first shipment, or pair of "production" boots that can be tried on. This represents a tremendous acceptance of a new, untried product. (Eizenberg Letter R111)

The undisputed facts also clearly show that the defendant contracted to supply goods in the state of Utah as contemplated by Section 78-27-24(2).

The defendant entered into a contract while in Utah to supply goods and services exclusively to plaintiff in Utah. Plaintiff has alleged that its claim arises from defendant's failure to supply the goods. By April 20, 1974, the defendant had already received orders for approximately $218,000.00 worth of ski boots. (Eizenberg Letter R111) The January 5, 1974, agreement provided that the sales would be recorded in the name of the plaintiff with delivery directly to plaintiff's customers.

The defendant attempts to explain away these sales to plaintiff and its customers by stating that the contract provides for FOB Los Angeles. Various courts, in construing the "long-arm" statute, have held that the FOB point is immaterial when considering whether or not a party has in fact contracted to supply services or goods to a resident of a particular state. It is undisputed that the defendant accepted orders from the plaintiff for goods sold to the plaintiff to be shipped to the plaintiff sole office and outlet and to other Utah retail outlets.

Defendant's trip to Utah on December 28, 1973,

was to conduct, face to face negotiations for the sale of its goods to the plaintiff in Utah. On January 5, 1974, while in Utah, defendant's general manager entered into a contract to supply plaintiff goods. The defendant accepted plaintiff's money and money orders pursuant to that contract. The defendant had to contemplate that many of the ski boots would be shipped to Utah directly from defendant's plant.

The defendant appears to be arguing that all of tests for the statutory "transacting business" and the test for "doing business" in Utah are the same. Such is not the case. Under the Utah "long-arm" statute the transaction of business does not necessitate a showing that a foreign corporation is in fact doing business in Utah under the traditional common law tests of doing business. The uniform "long-arm" statute, which Utah has adopted, codifies the Supreme Court approved doctrine that certain acts of a individual or foreign corporation will subject that person or corporation to the jurisdiction of local courts to defend claims based upon those activities regardless of what other business acts or activites the non-resident or foreign corporation may or may not have transacted within the state.

The transaction of business, in the "long-arm" statute is clear and unambiguous for it defines any act "affecting" persons or businesses in this state as an act of transacting business. Under this definition, a plaintiff need show only a claim arising from a form-related act which involves persons or businesses in this state. The defendant never has, nor can he deny, that his negotiations and contracting with the plaintiff in this state have obviously affected the plaintiff and that its Utah negotiated contract is the basis of this action.

Even if the District Court does not have jurisdiction over the defendant under the "long-arm" statute, the courts of Utah do have jurisdiction under the traditional doing business concept. The undisputed contacts of the defendant are substantial enough to meet the guidelines laid down in Hill v. Zale Corporation, 25U.2d357,482 P.2d 332.

While it may be true that the defendant does not physically have any local offices, stores, or outlets independent of the plaintiff, the plaintiff certainly acted as an outlet in Utah for defendant's goods. The defendant categorized the plaintiff as its "exclusive sales and merchandising operation" for its boots. Plaintiff's Utah (and

only office was defendant's sole national outlet. (Eizenberg Letter paragraph IV R110) Any skier desiring to purchase defendant's ski boots were required to purchase the same through the plaintiff, whose sole place of business was located at Provo, Utah.

Second, the defendant does not deny it hired, fired, and paid Utah residents to perform work in Utah in the production of the ski boots. The defendant hired the services of Mr. Wight of Salt Lake City, and, according to Mr. Eizenberg's affidavit, he personally came to Utah to review Mr. Wight's progress. (Eizenberg Aff. R 23, 24, 25) The defendant had the sole supervision of Mr. Wight and became dissatisfied with his work and discharged him. The defendant then requested the plaintiff's help in locating another artisan to complete the work commenced by Mr. Wight. Mr. Hall located an artisan by the name of Frank Riggs of Alpine, Utah.

Riggs discussed the nature of the project by phone with Mr, Eizenberg and agreed to work on the project at an hourly rate of $10.00 per hour. Mr. Riggs received models of the boots from the defendant and all direction on the prject came from the defendant. All problems and questions were directed to the defendant. Mr. Eizenberg flew to Utah and reviewed Mr. Riggs' work. (Eizenberg Aff. R 23,

24) Mr. Riggs received several pay checks from the defendant's parent corporation, namely Union Corporation of Verona, Pennsylvania, for the work performed for the defendant on an hourly basis. (Riggs Aff. R 96; copy of one Paycheck stub R 93)

Contrary to defendant's claims, the defendant did advertise in the state of Utah by several methods. These advertising efforts were part of a preconceived plan on the part of the defendant to advertise its own company name directly and also indirectly through the plaintiff. The defendant, almost from the beginning, insisted that the plaintiff insure that the name "UNION" be constantly "put before the buying public." (R110) The name of the plaintiff, Union Ski Company, was chosen because the defendant insisted that the name "Union" be broadly advertised and used by the plaintiff whenever and wherever possible.

The defendant further sought to advertise its company and its parent company in Utah, and throughout the nation, by furnishing literature and stock holders' reports to the plaintiff, to be distributed with the literature of the plaintiff to help generate sales of the ski boot. The said literature of the defendant was, in fact, distributed both nationally at trade shows and locally in Utah, and used in obtaining orders for defendants ski boots. To

further advertise the defendant's involvement in the sale of the ski boots, defendant's General Manager personally distributed literature about defendant at plaintiff's sales booths at trade shows in Boston, Chicago, and Las Vegas. The defendant provided information and photographs of defendant's plant and equipment to be used by the plaintiff in its sales literature. That literature was mailed to Utah ski boot customers.

The defendant consistently requested that the plaintiff advertise the defendant as the manufacturer of the ski boot. This reason became apparent when Mr. Eizenberg gave Mr. Hall a copy of a letter between Mr. Eizenberg and his superior, Mr. Haden. The last sentence of page 3 of that letter states:

> "If they [Union Ski Company] do not meet the goals in our contract, we [Union Plastics Corporation] are free to market OUR product in any way we see fit. Meanwhile the UNION name has been put before the buying public." [emphasis in original text]

Defendant's activities within the state meet the fourth guideline set forth in Hill v. Zale, in that the defendant has had, and still has, personal property within the state of Utah and negotiate banking arrangements in the State of Utah. The defendant shipped samples to the sculpturer, Mr. Riggs, and to the plaintiff. (copy of shipping

bills at R 91, 92) Some of the initial sculpture work and various model designs belonging to the defendant are still located in Utah.

On one of Mr. Eizenberg's trips to Utah, he and the principal officers of the plaintiff met with a Mr. Douglas Black of Tracy-Collins Bank and Trust Company in Salt Lake City. In that meeting with Mr. Black, it was determined that a special account would be set up at Tracy-Collins Bank and Trust Company, in the name of the defendant and the plaintiff. Customers would pay their invoices directly to that Utah bank account. No account was actually opened that day in the name of the defendant since it would not be needed until shipments commenced. Because defendant never manufactured any ski boots, shipments were never commenced. Defendant does not deny the meeting but only denies that an account was opened.

Defendant's activities within the state of Utah were continuous and systematic and not sporadic or transitory. Defendant's management at the highest levels of the corporation visited Utah as often as they deemed necessary to secure sales, to review production, to participate in sales meetings of the plaintiff, to negotiate with a bank, to review plaintiff's obligations under the contract. While

the visits may have been of short duration, the "activities" generated therby were continuous and systematic. Models were shipped to Utah, phone calls and letters on numerous occasions were exchanged, and artisans were working regularly under the direction of the defendant, all as a result of defendant's activities within the state. (Schmidt Aff. R21, Eizenberg Aff. R23; Kinder Aff. R28).

The sixth guideline set down by Hill v. Zale, supra, is fully met in the instant case. The vast majority of alleged facts of the asserted claim arose from activities within the state of Utah. Most of the negotiations and the January 5th contract were consummated in Utah. Most of the performance required by both the plaintiff and the defendant were generated from activities within the state of Utah. The damages to plaintiff resulting from the defendant's failure to manufacture any boots and fill any of plaintiff's orders, lies within the state of Utah.

The seventh guideline, that of relative hardship or convenience, is clear in the case at bar. The plaintiff has become insolvent as a result of the defendant's failure to fill its orders for plaintiff's sole product. Likewise, the officers of plaintiff are experiencing personal financial hard-

ship as a result of corporate loans that they guaranteed in furtherance of the contract between the parties. The plaintiff is totally without funds to effectively pursue this litigation outside of Utah. (Jolly Aff. R51) The defendant, on the other hand, is a company whose sales total in the millions of dollars and who has assets and resources far beyond those of the plaintiff. Furthermore, the current defendant, Union Plastics Corporation of California, is a subsidiary of the Union Corporation, a large corporate conglomerate who has heretofore financed the project. (R93) The resources and assets of the parent company number in the of millions of dollars. Certainly the defendant has the financial ability to defend this litigation within the State of Utah.

ARGUMENT

I

DEFENDANT VOLUNTARILY SUBMITTED ITSELF TO IN PERSONAM JURISDICTION OF THE COURTS OF THE STATE OF UTAH

At the time this action was by plaintiff's service of summons commenced, the parties were engaged in settlement negotiations. In order to enhance the prospects of a settlement, plaintiff stipulated that it would not require defendant to file an answer until 20 days after service on defendant's attorney of a written notice demanding the answer. In return for plaintiff's granting the extension of time to answer, defendant stipulated and agreed that it would accept and be bound by service of the demand upon its attorney. The simple complaint actually filed was the agreed method for plaintiff to preserve its service of process with the understanding that the complaint would be amended if negotiations failed. Defendant thus further stipulated that plaintiff could file an amended complaint without leave of court, and that such amended complaint would be acknowledged and accepted if served upon defendant's attorney. It

is universally acknowledged that in personam jurisdiction can be conveyed by consent of the defendant. Re-statement 2d of Conflict of Laws, section 32 (1971). Through the stipulation of the parties, and in exchange for the privilege of not being required to respond to plaintiff's pleadings, pending the outcome of the settlement negotiations, defendant agreed to have plaintiff's pleadings served upon its attorney, and thereby submitted itself to the jurisdiction of the courts of this state.

II.

THE COURTS OF UTAH CLEARLY HAVE THE CONSTITUTIONAL POWER TO ASSERT JURISDICTION IN THIS CASE UNDER APPLICABLE U.S. SUPREME COURT DUE PROCESS CASES.

As this court is already well-versed in the history of in personam jurisdiction since Pennoyer vs. Neff, 95 US 714 (1877), it is unnecessary to trace in detail that development. A brief summary of the present standards established by the Supreme Court will suffice. The pivotal case in the evolution of in personam jurisdiction is, of course, International Shoe vs. Washington, 326 US 310 (1945), wherein the Supreme Court abandoned the old concepts of "power," "implied consent," "constructive presence," and "doing business" in favor of the new "minimum contacts" standard. The court stated the

test as follows:

> Due process requires only that in order to subject a defendant to a judgment in personam, if he be not present within the territory of the forum, he will have certain minimum contacts with it such that the maintenance of the suit does not offend traditional notions of fair play and substantial justice.

This constitutional standard was further expanded by the court in subsequent cases. In McGee vs. International Life Insurance Company, 335 US 220 (1957), the Supreme Court upheld California's assertion of jurisdiction over a Texas corporation holding:

> It is sufficient for purposes of due process that the suit was based on a contract which had substantial connection with the state....

The extant of the defendant's contact with the state of California in McGee was a single life insurance contract between defendant and plaintiff, a resident of California. The defendant had no office or agent in California, and apart from the contract involved in the litigation, had never transacted any business in California. A reinsurance certificate offering to insure the plaintiff in accordance with specified terms was mailed to plaintiff in California. The plaintiff accepted the offer and paid the premiums by mail from California. Thus, under McGee, an isolated contract with a resident of the forum state satisfied the requirements of due process,

even though all contact and correspondence was through the mail.

The next year the court reiterated the minimum contacts requirement and added a further explanation:

> It is essential in each case that there be some act by which the defendant purposely avails itself of the privilege of conducting activities within the forum state. Hansen vs. Denckla 357 US 235 (1958).

The essence of the holding in Hansen is that the minimum contacts, or due process requirement, cannot be met merely by unintentional and unforseeable contact with the forum state.

In light of the controlling Supreme Court authorities and the facts of this case, Union Plastics has unquestionably had sufficient contact with this state to permit the Utah courts to assert jurisdiction without violating the due process clause of the Federal Constitution. Defendant's contacts with plaintiff in the state of Utah were certainly not unintentional or merely fortuitous. Indeed, the defendant availed itself of the privilege of working and dealing with a Utah corporation for the express purpose of furthering its manufacturing activities through a Utah outlet. It is equally as clear under McGee that a contract requiring a Utah corporation, with its sole place of business

in Utah, to do $600,000.00 worth of business with defendant the first year and $1,000,000.00 worth the second year, has "substantial connection" with the state of Utah. A comparison of the facts of this case with the nature and extent of the contacts held sufficient by the Supreme Court in International Shoe and McGee can lead only to the conclusion that the constitutional "minimum contacts" test has been satisfied in this case.

III

JURISDICTION UNDER THE UTAH "LONG-ARM" STATUTE IS CO-EXTENSIVE WITH THE FEDERAL CONSTITUTIONAL REQUIREMENTS OF DUE PROCESS AND SHOULD BE APPLIED TO THIS CASE.

Following the pronouncement by the Supreme Court of the new and more liberal constitutional standard for in personam jurisdiction, most states, including Utah, adopted the Uniform, Inter-state and International Procedure Act, commonly known as the "long-arm" statute. This uniform act was designed to extend the jurisdiction of state courts over non-resident defendants to the maximum extent permissible under the 14th Amendment. Not wanting to leave any doubt as to the legislative purpose or the scope of in personam jurisdiction in this

state, the legislature provided the following preamble to the statute:

> It is declared; as a matter of legislative determination, that the public interest demands that the state provide its citizens with an effective means of redress against non-resident persons, who through certain significant minimal contacts with this state, incur obligations to citizens entitled to the state's protection. This legislative action is deemed necessary because of technological progress which has substantially increased the flow of commerce between the several states resulting in increased interaction between persons of this state and persons of other states.
>
> The provisions of this act, to insure maximum protection to citizens of this state, should be applied so as to assert jurisdiction over non-resident defendants to the fullest extent permitted by the due process clause of the 14th Amendment to the United States Constitution. U.C.A. 78-27-22 (supp. 1969

To aid in implementing the purpose of the statute the legislature enumerated specific acts upon which "long-arm" jurisdiction may be based, providing in pertinent part:

> Any person, notwithstanding section 16-10-102, whether or not a citizen or resident of this state, who in person or through an agent does any of the following enumerated acts, submits himself, and if an individual, his personal representative, to the jurisdiction of the courts of this state as to any claim arising from:
>
> > 1. The transaction of any business within this state; 2. Contracting to supply services or goods in this state; . . .

Consistent with the mandate that jurisdiction be asserted over non-residents to the fullest extent permitted by the Federal Constitution is the defini-

tion of the phrase "transaction of any business within this state." Sub-section 2 of U.C.A. 78-27-23 defines the phrase as follows:

> The words "transaction of business within this state" mean activities of a non-resident person, his agents, or representatives in this state which affect persons or businesses within the state of Utah.

It is clear from the expression of legislative intent and from the formulation and language of the remainder of the statute that this state has legislatively abandoned the old concepts, such as "constructive presence," "implied consent," and "doing business" which were based primarily on the quantity of contacts with the forum state and has adopted the new minimum contacts standard enunciated by the United States Supreme Court.

The defendant has suggested and it is possible the court agreed (the district court's decision void if any explanation for its ruling) that the Utah "long-arm" statute should not apply to the instant case because it was not clearly plead. Plaintiff contends that it need not be plead in any specific language. As already stated, it was agreed between the parties that plaintiff would file a simple one page complaint to preserve its service of summons, that the defendant would not have to answer the complaint until further notice

and that plaintiff would be allowed to expand and replead its causes of action by amendment. (R4)

Plaintiff thus reserved the right which still exists to set forth its cause under all appropriate theories including jurisdictional facts, etc. Plaintiff's demand for an answer to its temporary complaint came when negotiations ceased. Plaintiff commenced preparing its amended complaint but received defendant's motions to quash and dismiss before the amendments were filed. Plaintiff is unable to determine from the district courts decision whether the "long-arm" statute was even considered. The pleadings as they stand should be construed to include all theories of jurisdiction in light of the stipulation between the parties for amending the complaint.

V

DEFENDANT'S ACTIVITIES BRING IT WELL WITHIN THE SCOPE OF THE UTAH "LONG-ARM" STATUTE BASED ON THE UNDISPUTED FACTS THAT AN EXCLUSIVE SALES AND MERCHANDIZING DISTRIBUTORSHIP CONTRACT WAS NEGOTIATED IN UTAH AND GOODS WERE CONTRACTUALLY SOLD IN UTAH.

In the instant case only two requirements under the Utah "long-arm" statute must be met to assert jurisdiction over Union Plastics:

1. Union Plastics must have either (A) been involved in activities in this state which affected persons or businesses within the state, which is "the transaction of business, or (B) "contracted to supply services or goods to a person or business in this state," and

2. Plaintiff's claim must arise from such activities.

It is not denied that Plaintiff's claim arises from the activities related to or based upon the contract dated January 5, 1974. The only question, therefore, is whether Union Plastics activities can be construed as (1) the transaction of business within this state, or (3) contracting to supply services or goods in this state. A comparison of the facts in this case with other cases in which this court and other courts have applied the "long-arm" statute clearly proves that this question must be answered in the affirmative and not in the negative as the trial court may have ruled. Since the Utah statute is a uniform act adopted by many other states, the construction of the act by the courts of other states is also relevant. It should also be noted that the statute has been upheld against constitutional attacks in states across the nation. It is to be construed in Utah so as to extend jurisdiction to the fullest extent permitted by the constitution.

First, cases applying the "transaction of business"

provisions of the statute will be compared with the present case. Foreign Study League vs. Holland-America Line, 27 Utah 2d 442 497 P 2d 244 (1972), has so many factual similarities with the present case that a detailed review of the facts is warranted. The plaintiff was a Utah corporation which chartered ships to foreign lands for educational purposes. The defendant was a foreign corporation with offices in Rotterdam, New York, Los Angeles, and other ports. Plaintiff was defendant's chief customer in the area of charter services. Defendant had no stores or offices and no employees or personnel in Utah. The only outlet, or contact, of defendant with the state was through travel agencies authorized to book its services. There was evidence that defendant's representatives had called on plaintiff in Utah to encourage it to sell defendant's space on a ship. The primary "contacts" between defendant and the state of Utah relied upon by plaintiff for jurisdiction over the person of defendant, and of the "acts" out of which the litigation arose were related to an attempt to reach an agreement to charter a ship. Negotiations took place in Salt Lake City and in New York. There was correspondence by mail, telegram, and telephone between the arties. A proposed contract was sent to plaintiff

in Salt Lake City, but it was not entirely satisfactory and defendant sent an agent to Salt Lake City to "confer with plaintiff's officers re. a dispute or misunderstanding as to the contract." The contract was sent back to defendant unsigned. It is unclear why the contract was not signed, but a $160,000.00 check was sent to defendant in connection with the negotiations. Based on these facts, this court concluded that the defendant had transacted business in Utah under the letter and spirit of International Shoe, Hill vs. Zale, an earlier opinion of this court, and the Utah "long-arm" statute. The court added that the plaintiff's case was further strengthened by the sub-agency agreements which defendant had with local travel agents. It was also implied in the court's opinion that the plaintiff's case would have been even stronger if the agency agreements had been exclusive agreements, imposing a higher degree of control over the agents. Mr. Justice Crockett, who dissented, indicated he may have concurred in the majority opinion had there been a valid contract between plaintiff and defendant. All of these factors are present in the instant case. That there was a con tract is not disputed. Defendant characterized the plaintiff as its "exclusive sales and merchandizing operation." Under

the terms of the contract, extremely tight controls, such as minimum sales requirements, are imposed on plaintiff.

In contrast to Foreign Study League vs. Holland-America Line is Mack Financial Corporation vs. Nevada Motor Rentals, Incorporated, a case recently decided by this court and apparently relied upon by the trial court in the present case. Mack Financial Corporation is clearly distinguishable on the facts from the present case. Nevada Motor Rentals, a foreign corporation, purchased trucks in Denver, Colorado, on conditional sales contracts from Mack Trucks, Inc., a Delaware corporation, Mack Trucks assigned its interest in the sales contracts to Mack Financial, a fully owned subsidiary authorized to do business in Utah. Nevada encountered difficulty making the payments and arranged to turn the trucks and the contracts over to an Idaho business entity. Since the contracts forbade an assignment without the permission of the seller or its assignee, Nevada sent an agent into Utah to request consent to an assignment. Mack Financial made its own investigation and prepared and signed an assignment. Nevada's assignee defaulted on the contracts and an action was brought on the contracts naming Nevada as a party defendant. This court correctly

found on these facts that jurisdiction could not be asserted over Nevada. Nevada had not contracted to supply anything in Utah and the plaintiff's claim did not arise out of any transaction of business by Nevada in the state. Nevada's only act in the state of Utah was requesting Financial's consent to an assignment and the plaintiff's claim did not arise out of this act. It is incredible to contend that Mack Financial Corporation controls the present case.

The California "long-arm" statute construed in Buckeye Boiler Company vs. Superior Court of Los Angeles County, 80 Cal Reporter 113 458 P 2d 57 (1969), provided, as does the Utah statute, that jurisdiction was to be extended as far as permissible under the 14th Amendment. The exact statutory language in issue was "doing business." The California Supreme Court construed the statute to mean that there must be economic activity on the part of the defendant in the forum state, and that the cause of action must arise out of or be connected with defendant's forum related activity. The defendant, Buckeye, had no agent, office, sales representative, exclusive agency or exclusive sales outlet, warehouse, stock of merchandise, property, or bank account in California. It did not sell on consignment to,

and had no commission agreement with any person or entity in California. However, for a period of five years prior to plaintiff's injury, the defendant had sold pressure tanks to Cochin Manufacturing Company, an Ohio corporation, which maintained a manufacturing plant in South San Francisco. Cochin ordered some tanks directly from that plant and purchased others through its Ohio office. Defendant shipped the tanks directly to the Cochin plant in San Francisco. Annual gross sales to Cochin ranged from $25,000.00 to $35,000.00. Other than the sales to Cochin, Buckeye had no contact with anyone in the state of California. Nevertheless, the Court held:

> A manufacturer engages in economic activity within a state as a matter of commercial actuality whenever the purchase or use of its product within the state generates gross income for the manufacturer and is not so fortuitous or unforseeable as to negative the existence of an intent on the manufacturer's part to bring about this result. . . .
>
> In the present case, it is clear that defendant derives substantial economic benefit from the sale and use of its products in California; it currently derives about $30,000.00 annually in gross sales revenues from its direct sales of certain pressure tanks to the Cochin Manufacturing Company plant in South San Francisco. On the basis of these sales alone, defendant is purposely engaging in economic activity within California as a matter of commercial actuality.

That Union Plastics products were purchased in Utah by Union Ski, generating gross income to

Plastics, can in no way be considered fortuitous or unforseeable. Such economic activity by Plastics in Utah was the object of the contract calling for a continuous economic activity in Utah amounting to millions of dollars.

The Tenth Circuit Court of Appeals explained the meaning and proper application of the term "transaction of business within this state" in Doyn Aircraft, Inc. vs. Wylie, 443 F. 2d 579, Tenth Circuit, (1971), a case factually very similar to the present case. The Court held:

> In a broad sense business is transacted within the state when an individual is within or enters this state in person or by agent and through dealing with another within this state, effectuates or attempts to effectuate a purpose to improve his economic conditions and satisfy his desires.

The Court further held that acts of negotiating a contract were business transactions in the sense that the defendant "was trying to effectuate a purpose to improve his economic conditions and satisfy his desires, and that in so doing he purposely availed himself of the privilege of conducting activities within the forum state." See also Hunter Hayes Elevator Co. V. Petroleum Club Inn 419 P. 2d 465 (1966) where the New Mexico State Supreme Court upheld jurisdiction where the only contact with New Mexico was preliminary negotiation of a

contract.

The Court of Appeals for the 7th Circuit, affirmed a decision of the Federal District Court in Illinois, upholding jurisdiction over an English corporation under the Illinois "long-arm" statute, which is word for word the same as the Utah statute. The Court held:

> A defendant who sends an agent into Illinois to solicit or to negotiate a contract is transacting business within the statutory definition.
>
> The fact that some of the important pre-contract negotiations were conducted elsewhere than Illinois and that the actual execution of the contract occurred outside of Illinois' borders is immaterial. Scovill Manufacturing Company vs. Dateline Electric Company, 461 F. 2d 897 7th Circuit, 1972)

"Long-arm" jurisdiction was asserted over Utah residents who secured a bank loan in Colorado by the courts of that state under the Colorado "long-arm" statute, which is also identical to the Utah statute. The issue and holding in that case were stated by the Court as follows:

> So, the precise question to be resolved, then, is whether the bank's cause of action does, or does not, "arise from" the transaction by the petitioners of "any business" within the state of Colorado. We hold that the bank's claim does arise from the transaction of "any business" by the two petitioners within this state, and that under the circumstances the service of process was quite properly upheld by the trial court.
>
> It seems evident to us that the petitioners most certainly did transact business within

> this state. To illustrate, petitioners, and each of them, voluntarily left their place of residents in Utah and made the long journey to Adams County in Colorado. There they very successfully negotiated a loan of $30,000.00 from the bank. At this same time and place, the petitioners, in return for this loan, executed and delivered to the bank their promissory note in the principal amount of $30,000.00. Surely, it cannot be seriously denied that the petitioners, physically present within the state, did transact business--and about $30,000.00 worth of business--within this state. Knight vs. District Court of Seventeenth Judicial District, County of Adams, 424 P 2d 110 Colorado (1967).

Oregon has also adopted precisely the same "long-arm" statute as Utah. In State, ex rel. White Lumber Sales, Inc. vs. Sulmonetti, 448 P 2d 571 Oregon (1968), the Oregon Supreme Court upheld the assertion of Jurisdiction over a non-resident on the basis of a single telephone order for a carload of plywood. The Court, noting the statutory definition of "transaction of business" said, "It is clear that the placing of the telephoned order had effects, or 'significant contacts,' in Oregon." It is even more clear that Plastics' activities in this case have had effect on persons and businesses in Utah.

The holdings of these cases and many more are represented to some extent in Re-Statement 2d, Conflict of Laws, section 84, comment at 91.

> It is reasonable that a state should have judicial jurisdiction over any individual as to causes of action arising from an act done for pecuniary

> profit having substantial consequences within the state even though the act is an isolated act not constituting the doing of business within the state.

Certainly, it cannot be denied that the acts of the defendant in this case were done for pecuniary profit, nor can it be denied that the consequences of these acts suffered by plaintiff are subtantial.

In the following three cases, "long-arm" statutes containing provisions similar to the Utah provision for jurisdiction over any person contracting to supply services or goods in the state are construed and applied. The following facts were the basis of jurisdiction in Kornfuehrer vs. Philadelphia Bindery, Inc., 240 F. supp. 157 (1965). The plaintiff wrote the defendant to ask if it manufactured spring back binders. A series of letters followed in which the parties discussed specifications and terms. For the purposes of the case it was assumed that in late March the plaintiff placed an order for 7,500 binders and the defendant accepted it. A few days later the defendant wrote the plaintiff, telling him that it had made an error in its cost estimates and would not be able to produce exactly the type of binder he wanted except at a substantially higher cost. The plaintiff replied that he had already made commitments which prevented him from allowing the order to be cancelled and he

eventually instituted suit for breach of contract. The court relied on three legal issues from the Supreme Court opinion in McGee and found all three to support jurisdiction in the case.

1. The contract was delivered in the forum state.

2. Payment was made from the forum state.

3. The plaintiff was a resident of the forum.

The court dealt with another of the defendant's arguments as follows:

> The shipment was to be FOB Philadelphia and those shipping terms have served as the basis for an argument on the part of the bindery that no part of the contract was to be performed by it in Minnesota.
>
> Actually the argument seems irrelevant. If the transfer of the binders is not considered a part of the defendant's performance, then it is part of the plaintiff's. Any realistic treatment of the transaction must view the carrier bringing the shipment as the agent of one or both of the parties. As mentioned earlier, the One-Act statute applies when an act of either party is to be performed in Minnesota.

Whether defendant in this case claims it was to ship ski boots FOB Los Angeles to plaintiff or to plaintiff's customers under the contract, the fact remains that the boots were to be supplied to customers in the state of Utah since both plainciff and many of plaintiff's customers are Utah residents.

Defendant has argued that the courts of this state cannot assert jurisdiction over it because the contract between plaintiff and defendant was to

be performed outside of the state of Utah. This issue was dealt with in Midwest Packaging Corporation vs. Realikon Plastics, Ltd., 279 F. Supp. 816 (1968). In response to the same argument made by defendant in the present case; the court held:

> Further, it cannot be denied that the contract as alleged by plaintiff was to be performed in whole or in part in Iowa. Plaintiff is any Iowa corporation with its principal place of business in Iowa. Therefore, by necessity, many of the acts required for performance of the alleged exclusive sales contract would take place in Iowa. Thus, the defendant has failed to rebut the prima facie showing by plaintiff of the existence of such a contaact, thereby naking the provisions of section 617.3 applicable to the case at bar.

The same result was reached in Clark Advertising Agency, Inc. vs. Tice, 331 F. Supp. 1058 Northern District of Texas, 1971. That court held:

> The "long-arm" statute clearly applies regardless of which party it is who does the performance in Texas

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THE DISTRICT COURT HAS JURISDICTION UNDER THE TRADITIONAL MINIMUM CONTACTS THEORY.

Even if the lower court does not have jurisdiction over the defendant under 78-27-24, U.C.A. (supp. 1969), the courts of Utah do have jurisdiction over the defendant under the traditional "minimum contacts" theory. This court has recognized the minimum contacts theory of International Shoe; etc. in recent cases.

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While this court set down some guidelines in Hill v. Zale Corporation No. 12136, Utah Supreme Court, March 9, 1971, each case must be considered on its own facts within the bounds of justice and fair play. A careful analysis of defendant's business activities in the state of Utah are sufficient to assert jurisdiction.

Using the guidelines of Mack v. Nevada, Supra the court apparently failed to consider the following activities of defendant. Plaintiff was defendants sole marketing operation, in Utah, nationally and internationally. Defendant hired, fired and paid Utah residents on an hourly basis. This evidences that part of defendants performance of his obligations under the contract were performed in Utah. Defendant brought literature about defendant to Utah for distribution to aid in sales. Defendant provided pictures of defendant's plant for enclusion in sales literature. Defendant participated in plaintiffs sales meetings and staffed plaintiff's sales booths. The defendant insisted its name UNION be "put before the buying public". (R110) Defendant negotiated banking arrangements with a Utah bank. Defendant's personnel of the highest level came to Utah several times to review plaintiff's progress and the progress of their design work. Defendant shipped personal property to and from

Utah and still has some here. Most of the contract actually performed was in Utah. The contract provided for sales in the millions of dollars and was to continue over a period of years. Defendant was paid $25,000.00 in Utah. Plaintiff's performance in Utah generated acknoweldged orders for defendant's new boots in excess of $250,000.00. Defendant's failure to deliver a single order to plaintiff and its customers turned plaintiff's performance into a financial nightmare for plaintiff and its principal officers that personally guaranteed plaintiffs performance. Defendant's breach has resulted in plaintiff being financially unable to effectively seek relief against defendant outside of Utah. In contrast defendant does have the assets and capital to defend its actions in the State of Utah.

CONCLUSION

In light of the above, the trial court erred in not finding sufficient minimum contact to sustain jurisdiction. There is no due process reason why defendant, engaging purposefully in all of the above conduct in Utah, would be treated unfairly and unjustly if the Utah courts required it to defend claims based on those purposeful acts either under the Utah "long-arm" statute or under the traditional minimum contacts theory. It is also evident that the lower court erred in interpreting the law and in failing

to consider defendant's total undisputed substantial business contacts with the State of Utah. The ruling below on defendant's motion to dismiss should be reversed and the lower court be required to assert jurisdiction.

Respectfully submitted,

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